Supreme Court, U.S.

05-1663 APR 6 2006

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IN THE
Supreme Court of the United States

TIMOTHY KUZMA AND NANCY KUZMA

Petitioners,

v.

THE CITY OF FORT MYERS, a Florida municipal corporation

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether review is warranted in this case because the District Court and the Court of Appeals disregarded the substantive law of Florida applicable to the pendent state claim for inverse condemnation.

Whether the Court's jury instructions prevented the Petitioners from having a fair trial on the merits and the jury's verdict is erroneous or a miscarriage of justice in violation of their Seventh Amendment Right under the United States Constitution.

PARTIES TO THE PROCEEDING

The following individuals and entities are parties to the proceeding in the court below:

Timothy Kuzma, Nancy Kuzma, William M. Powell, Esquire, the law firm of Powell & Steinberg, P.A., the City of Fort Myers, Theodore L. Tripp, Jr., Esquire, the law firm of Garvin & Tripp, P.A., and Honorable Gregory A. Presnell, United States District Judge, Middle District of Florida.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

This is an appeal from the United States Court of Appeals for the Eleventh Circuit in its decision rendered on October 3, 2005 and its denial of Petitioners' Petition for Rehearing En Banc on November 29, 2005. The Court of Appeals affirmed the trial court's ruling.

JURISDICTION

The United States District Court for the Middle District of Florida had jurisdiction pursuant to 28 U.S.C.§ 1331 to try the federal search and seizure and due process claims arising under the Fourth and Fourteenth Amendments to the United States Constitution brought under 42 U.S.C. §1983 and the pendent Florida claim for inverse condemnation.

This is an appeal from the United States Court of Appeals for the Eleventh Circuit in its decision rendered on October 3, 2005 and its denial of Petitioners' Petition for Rehearing En Banc on November 29, 2005. This Court on February 21, 2006 granted an extension to the time for filing the petition for writ of certiorari.

The Supreme Court of the United States has jurisdiction pursuant to 28 U.S.C. §1254 by certiorari from a decision from the United States Court of Appeals for the Eleventh Circuit.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Petitioners' Seventh Amendment Right under the United States Constitution and Petitioners' substantive procedural due process rights under the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

This case involves an injustice to an American family caused by the misuse of government power. The City of Fort Myers put the Kuzma family out of business and demolished their motel buildings resulting in a mortgage foreclosure of their property and sending them to financial ruin. The City undertook this action for community redevelopment and under false pretenses. The justification for putting the Kuzma family out of business and demolishing their buildings: some of the rooms were dirty.

Timothy and Nancy Kuzma owned and operated the Edisonian Court Motel in Fort Myers since 1984. In the 17 years that the Petitioners owned the property, it supported their family. Due to competition from newer upscale hotels and a changing neighborhood, the Edisonian Court Motel's clientele changed from tourists to blue collar workers. The Edisonian Court Motel was not going to make the Petitioners independently wealthy, but it did generate approximately $11,000 in gross income and paid the mortgage.

Several months before the City had seized, closed and demolished the motel, the Petitioners were cited by the City for code infractions and in July, 2000, the City cited the motel for various code violations. The Petitioners corrected the infractions and the matter was dismissed by reason of compliance. The Petitioners had always been cooperative with the City's code enforcement and always showed interest to repair violations The Petitioners even went so far as permitting the City's police to run a prostitution sting with undercover "prostitutes" on the motel property. With the exception of the "prostitutes" used in the City's sting, there were no prostitutes or drug dealers operating on the Edisonian property. The periodic inspections by the Florida Division of Hotels and Restaurants were uneventful. This all changed on December 6, 2000.

On December 6, 2000, the full power of the City of Fort Myers was brought to bear against the Kuzma family. City police officers, code inspectors, fire inspectors, building inspectors, and inspectors from the Florida Division of Hotels and Restaurants, at the request of the City, descended on the Edisonian Court Motel, accompanied by local tv news camera crews. They were there to execute the "Problem Solving Plan" made by City officers . The Plan identified "prostitution, drugs, trespassers, code enforcement and building violations" as problems in the neighborhood and part of the goal was to "condemn and level existing buildings that continue to cause environmental and quality of life issues." Unidentified "subjects who live and/or hang out at the Edisonian Court Motel" were identified in the Plan as the "root cause" of the neighborhood's problems . The Plan said these unidentified subjects were "for the most part drug dealers/users or prostitutes" and "lack of cooperation from the

manager of the hotel with police was a problem" . The allegations of drug dealing, drug use and prostitution at the Edisonian in the Plan were never verified and the officers that authored the report could only state a prostitute was arrested at the motel on a warrant. Notwithstanding, the Plan identified a white male resident of the adjoining apartment building as being responsible for 65% of the area's problems, and many of the area's crime problems emanated from areas outside the motel. The City never inspected, closed or demolished any other businesses from which these problems originated.

Consistent with the City's intent as stated in the Plan, the City found several code violations, ordered the buildings be vacated and the Petitioners to demolish the motel, and if they did not, the City would and charge the cost of demolition to the Petitioners. Notwithstanding, the code violations cited by the City all could have been repaired for less than $5,000, and none of the violations were structural in nature, City ordered the buildings be demolished. Moreover, according to the City's Fire Marshall, there were no fire safety violations that warranted demolition of the buildings.

The City vacated all customers of the motel, ordered it closed and posted orange placards on the buildings stating that the buildings were unsafe structures to be demolished and not to be occupied.

With the business closed, the buildings were demolished by the City, the Petitioners' mortgage foreclosed and the Petitioners lost everything.

The Edisonian Court Motel did not present a threat to the public health, safety or welfare that justified demolition of the buildings. There were no structural defects in the building that put them in danger of collapse, nor did any of the code violations cited by the City individually or collectively amount to legal justification for demolition, or its closure.

Petitioners filed a multi-count complaint against the City alleging a number of allegations including an unreasonable seizure in violation of 42 U.S.C. §1983 and a state law claim for inverse condemnation based upon the Motel's demolition by the City several months after the seizure. This matter was tried twice in the United States District Court for the Middle District of Florida. During the first trial, the District Court granted judgment as a matter of law to the City on the inverse condemnation claim and the Court would not allow evidence of the Petitioners' claim that they had lost the equity they had built up in the property because the closure disrupted the income necessary to pay their mortgage. At the first trial, the jury found that the City violated the Petitioners' Fourth Amendment Right to the United States Constitution when it seized/closed the Edisonian Court Motel. The issues of the first trial were presented to the United States Court of Appeals for the Eleventh Circuit concerning the Petitioners' Title 42 U.S.C. 1983 lost equity claim and other state issues and the matter was remanded to the District Court for trial on damages for the Fourth Amendment Constitution violation in connection with their lost equity claim and their state inverse condemnation claim for the demolition of all the buildings. At the second trial before the District Court, the Court would not inform the jury of the prior jury's finding of fact and law that the Petitioners' Fourth Amendment Constitutional Rights were

violated when the City seized and closed their motel and refused to grant the Petitioners a twelve member jury trial on the state inverse condemnation claim and refused to adopt jury instructions which Petitioners presented as consistent with the United States Court of Appeals for the Eleventh Circuit on their lost equity claim under Title 42 U.S.C. 1983.

At the jury charge conference, the Petitioners' attorney objected to the proposed jury instructions by the City and the Court with respect to the constitutional claim under 1983 on the grounds that the jury was not being told the basis of the claim. The jury was only being told that the motel was unreasonably closed by the City (and was not being advised that the City violated the Petitioners' Fourth Amendment Right to the United States Constitution when it seized/closed the hotel), suggesting that the jury instructions should read, "This is a constitutional tort case where its already been determined that the City of Fort Myers seized and closed the Edisonian Court Motel, violating the Petitioners' Fourth Amendment Right to the United States Constitution and your issue in this case is to determine if they have any damages." The Petitioners' attorney also objected to the Court's causation instruction on the grounds that the instruction had more than one causation requirement with respect to their claim for lost equity, one instruction requiring that the loss of equity through foreclosure was reasonably foreseeable and the other one was that it had to occur "at or near" the time the property was closed by the City. The Court gave its instructions over the objections of the Petitioners. The Petitioners also objected to the Court's jury instruction on damages because it did not identify that the Petitioners were seeking compensation for inverse condemnation.

The City's expert testified that the land was valued at $510,000 and concluded that the subject property had a market value in the amount of $565,000, and after adjustments, concluded that the value was $550,000 for the market approach to value and the allocation of $510,000 for the land prescribed that the improvements were worth $40,000, which included the motel laundry facility. The City's expert testified that the highest and best use would be to operate the property as a motel until you find a buyer that will eventually demolish the improvements and produce a more intensive use. The gross operating income for the property established by the City's expert was $130,932 in 1996, $120,000 in 1997, $112,612 in 1998, $141,351 in 1999, and $123,204 for the year of 2000, which did not include the laundry revenue which would be estimated at approximately $6,500. The Petitioners objected to the verdict form on the grounds that it imposed a proximate cause for the lost equity valuation as the date the business was seized by the City (December 6, 2000) and that the verdict form did not identify that the matter was an inverse condemnation case. The Court overruled the objections. The jury verdict found that the fair market value for the property as of December 6, 2000 was $510,000 for the land and $72,000 for motel structures for a total of $582,000. The jury found that the encumbrances consisted of $555,000. The jury then found that the total equity in the property was $27,000 as of December 6, 2000. The jury then found that the Petitioners did not lose equity in the property through mortgage foreclosure and that the mortgage foreclosure was not proximately caused by the motel being closed by the City. The jury then answered the question,

"What amount, if any, would constitute full compensation for the value of the motel structures at the time they were demolished?" by placing a zero ($0) for the amount. The Petitioners filed a motion for mistrial, new trial, and for judgment notwithstanding the verdict and the Court denied Petitioners' motion. The final judgment was entered by the Court on December 8, 2004. The Petitioners filed the notice of appeal on December 22, 2004. Based upon the jury's verdict, the Court determined that the City was the prevailing party and awarded costs to the City. The order granting costs to the City was entered on December 22, 2004; after the City's motion to reconsider the cost award the Court entered an endorsing order denying the motion for reconsideration of costs, on February 2, 2005. The Petitioners filed a notice of appeal on the judgment and order taxing costs on February 2, 2005; and an amended notice of appeal on the judgment and order taxing costs filed February 2, 2005. The appeals were consolidated. The Petitioners timely filed all Notices of Appeal of the judgement and order. The trial court was affirmed by the United States District Court of Appeals for the Eleventh Circuit on October 3, 2005 and denied Petitioners' Petition for Rehearing En Banc on November 29, 2005. This Court granted Petitioners' extension of time for filing a Petition of Writ of Certiorari to and including April 28, 2006.

REASONS FOR GRANTING THE PETITION

I. Review Is Warranted in this Ca e Because the District Court and the Court of Appeals Disregarded the Substantive Law of Florida Applicable to the Pendent State Claim for Inverse Condemnation

The Petitioners filed a claim for inverse condemnation under Article X, sec. 6(a) of the Florida Constitution for the unjustified destruction of their buildings. The Florida Supreme Court , interpreting Article X, sec. 6(a), adopted the rule of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164 (1982) that a per se taking occurs when government affects a permanent physical occupation of private property. *Storer Cable T.V. v. Summerwinds Apartments*, 493 So.2d 417 (1986); *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

The City entered Petitioners' property, reduced Petitioners' buildings to rubble and carted away the demolition debris. The City physically took Petitioners' property and permanently deprived them of it. Notwithstanding these facts, the District Court refused to find an uncompensated taking of property occurred. In fact, the District Court declined to rule on this issue at all but rather submitted the issue of value of the buildings to the jury. The jury returned a verdict of no value for the Petitioners' buildings, notwithstanding the range of value testified to by the appraisal experts was $40,000 to $251,200 and the buildings generated a monthly gross income of $11,000.

Under the applicable Florida substantive law, the jury may not award a verdict in an amount lower than the lowest nor higher than the highest value supported by the evidence. *Sallas v. State Road Department*, 220 So.2d 378 (Fla. 1st DCA 1969). A verdict that is lower than the lowest value testified to violates the constitutional mandate of full compensation. *Garvin v. State Road Department*, 149 So.2d 869 (Fla. 1st DCA 1963). The values testified to were $40,000 by City's expert , $72,400 by City's admission by interrogatory and $251,000 by Petitioners' expert . As a matter of Florida law, the jury was required to award a value between $40,000 and $251,000.

The decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938) requires federal courts to apply state substantive law and federal procedural rules to resolve state law claims. See *Chamberlain v. Giampapa*, 210 F.3d 154, 158 (3d Cir. 2000). Although *Erie* is frequently cited in diversity cases, the *Erie* doctrine applies equally to state-law claims over which federal courts exercise pendent jurisdiction. Therefore, federal courts exercising pendent jurisdiction are to apply the *Erie* doctrine to the same extent as if the court were sitting in a diversity case. The *Erie* court explained: "Except in matters governed by the Federal Constitution or by acts of congress, the law to be applied in any case is the law of the state" Id., at 78. *Felder v. Casey*, 487 U.S. 131, 151, 108 S.Ct. 2302, 2313 (1988); see *Houben v. Telular Corp.*, 309 F. 3d 1028 (7th Cir. 2002). The reason for the rule is to ensure that, as far as the substantive law that determines the outcome of a case, the outcome of the case in

federal court will be substantially the same as it would be if tried in a state court. *Guaranty Trust Co. v. York*, 326 U.S. 99, 109, 65 S.Ct. 1464, 1470 (1945).

In our case, the District Court failed to apply the applicable Florida substantive law that holds an uncompensated permanent physical taking of private property constitutes a "taking" under Article X, sec. 6 of the Florida Constitution. Additionally, the District Court failed to apply the substantive law of Florida to the state inverse condemnation claim when it refused to instruct the jury it was required to enter a verdict no lower than the amount testified to by the City or its expert and by denying Petitioners their right to a twelve person jury under section 73.071 (1), Fla. Stat. (2004).[1]

The Court of Appeals also sidestepped the failure to decide whether the unjustified permanent physical taking of Petitioners' buildings constituted a per se taking under Article X, sec. 6(a) of the Florida Constitution. Accordingly, there was no reason of the Court to ignore the state law and it was applicable in this case. *Boyd v. United Technologies Corp.*, 487 U.S. 500

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1 Petitioners were required to file a Florida inverse condemnation claim rather than a Fifth Amendment taking claim under the rule of *Williamson County Regional Planning Comm'n. v. Hamilton Bank*, 437 U.s. 17, 105 S.Ct. 3108 (1985): "...if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied compensation." 473 U.S. at 195. See also *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 117 S. Ct. 1659 (1997) holding that ordinarily a landowner must exhaust an available state inverse condemnation remedy before pursuing a federal claim under the Just Compensation Clause.

(1988); *Robertson v. Wegmann*, 436 U.S. 584 (1978) which generally set forth the principles of this Court for applying state law. This Court also decided in numerous cases that compensation is required when government appropriates private property. *Wright v. The United States*, 302 U.S. 583 (1938); *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003); *Monongahela Nav. Co. v. The United States*, 148 U.S. 316 (1893); *Armstrong v. The United States*, 364 U.S. 40 (1960).

II. The Court's Jury Instructions Prevented the Petitioners from Having a Fair Trial on the Merits and the Jury's Verdict Is Erroneous or a Miscarriage of Justice in Violation of Their Seventh Amendment Right under the United States Constitution

That prior to this jury being provided jury instructions, during a charging conference, Appellants' counsel objected to the proposed jury instructions by the Court. Under the Seventh Amendment to the United States Constitution, Petitioners had a right of trial by jury and their rights were abrogated by the failure of the Court to provide appropriate jury instructions that framed the legal issues of Petitioners' theory of recovery.

As explained by the Court in *Commonwealth Ins. Co. V. Titan Tire Corporation*, 03-3223 (7th Cir. 2004), "We review jury instructions with deference, analyzing them as a whole to determine if they accurately state the law and do not confuse the jury." *Aliotta v. Nat'l R.R. Passenger Corp.*,315 F.3d 756, 759 (7th Cir. 2003); see also *Pearson v. Daimler Chrysler Corp.*, 813 N.E.2d 230, 237 (Ill. App. Ct. 2004). "Reversal is warranted when an instruction misstates the law and this misstatement

misled the jury causing prejudice to one party." See Aliotta, 315 F.3d at 759; Pearson, 813 N.E.2d at 237. The jury instructions in this case fail to inform the jury that it has been determined that the City of Fort Myers violated the Petitioners' right to be free from unreasonable seizure when the City closed or caused the closure of the Edisonian Court Motel. We suggest that the Court should have conveyed this information to the jury. This information was the basis for the jury's consideration of damages to the Petitioners. The Appellants had the burden of proof, and as explained by the United States District Court of Appeals for the Eleventh Circuit, "1983 should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions . . . . for damages to be approximately caused by a constitutional tort, a Plaintiff must show that, except for that constitutional tort, such injuries and damages would not have occurred and that such injuries and damages were the reasonable, foreseeable consequences of the Defendant's tortuous acts."

As the United States Court of Appeals explained when it reversed and remanded this case for the second trial, "First, the City illegally closed or caused the closure of the Motel, a finding that the City does not challenge or appeal." Accordingly, the background of this lawsuit for damages is the constitutional tort for which the City has already been found liable. Without the jury being told of the constitutional tort, it had no basis, whatsoever, to award damages to the Petitioners. It was sitting as though it's providing an advisory opinion, rather than hearing a trial on damages for the constitutional tort committed against the Appellants. Without explaining to the jury the basis for the claim, the unconstitutional seizure/closure of the Edisonian Court Motel

and inverse condemnation, the facts were sugarcoated for the benefit enjoyed by the City, and a biased disadvantage in this trial to the Petitioners. There is no basis in law for not telling the jury the reason it was considering damages. By providing a jury instruction that merely tells the jury of a closure made permanent when the City demolished the Motel, the jury cannot fashion a remedy to right the wrong and the Petitioners were deprived of their right to a jury trial on the issue of damages of conduct of the City. Why should they award damages for lost equity merely because the City closed the Motel? If they knew that the City violated the Petitioners' constitutional rights, that would connect the Petitioners' claim to the wrongful conduct of the City and provide the jury with a basis for awarding damages. Simply to tell the jury that they're going to consider damages because the Motel was unreasonably closed; and that the Motel's closure became final when it was demolished, does not explain to the jury the legal basis for the award of damages, and as such, Petitioners could not carry their burden of proof as required by the Eleventh Circuit. Petitioners' burden of proof was to causally connect the constitutional tort, i.e., the jury's findings that the City violated the Petitioners' right to be free from unreasonable seizure when the City closed or caused the closure of the Motel, and "Whether the City's seizure of the motel caused the subsequent foreclosure and loss of equity." Accordingly, the procedural due process instituted for the full trial on the merits, because of the erroneous jury instructions, rendered the trial procedurally defective and allowed for a mistaken or unjustified depravation of their property. Procedural due process and the right to a jury trial under the Seventh Amendment merges when jury instructions do not articulate the law or fail to disclose the basis for the trial to the trier of fact. *Carey v. Piphus*, 435 U.S. 247 (1978); *Fuentes*

v. Shevin, 407 U.S. 67 (1972); *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996); *Monterey v. Bell Monte Dunes At Monterey, Ltd.*, 526 U.S. 687 (1999).

Fundamental principles of due process require a new trial or the Appellants will be denied their Seventh Amendment Right of the United States Constitution.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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April 27, 2006

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FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
OCTOBER 3, 2005
THOMAS K. KAHN
CLERK

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 05-10844 & 05-10846
Non-Argument Calendar

D.C. Docket No. 01-00258-CV-FTM-29SPC

NANCY A. KUZMA,
TIMOTHY A. KUZMA,

Plaintiffs-Counter-
Defendants-Appellants,

versus

CITY OF FORT MYERS,
a Florida municipal corporation.

Defendant-Counter
Claimant-Appellee.

Appeals from the United States District Court
for the Middle District of Florida

(October 3, 2005)

Before CARNES, MARCUS AND WILSON, Circuit Judges.
PER CURIAM:

This case arises out of the seizure and demolition of the Edisonian Court Motel ("Motel") by the City of Ft. Myers ("City"). Nancy and Timothy Kuzma, the owners and operators of the Motel, filed a multi-suit claim against the City, alleging procedural due process and unreasonable seizure violations under 42 U.S.C. §1983, and a state-law inverse condemnation claim based on the Motel's demolition. This is the second time this case has been before this Court. When we last considered this case, we remanded the case back to the district court.

There were three factual issues to be resolved on remand: 1) whether the Kuzmas had equity in the Motel at the time the City closed it; 2) whether the City's closure of the Motel caused the Kuzmas to lose their equity, if any; and 3) the amount of just compensation for the demolished Motel buildings, if the trial court were to find that the City's demolition amounted to a taking.

At the close of the evidence, the district court instructed the jury that the Kuzmas had brought two claims: first, that they suffered economic damages in the form of lost equity because the City unreasonably closed the Motel; and second, that they were entitled to just compensation from the City for the demolition of the improvements. The jury was instructed to calculate the equity the Kuzmas had in the Motel property at the time of the closure, by determining the fair market value of the land and the improvements, less the encumbrances, and to determine whether the Kuzmas lost their equity, if any, as a result of the City's unreasonable closure of the Motel. The jury was instructed further to determine the amount of just compensation, as measured by the value of the improvements on the day they were demolished, to which the Kuzmas would be entitled if the court found that a taking had occurred.

The jury found that, as of December 6, 2000, the Kuzmas had $27,000 of equity. The jury, however, found that City's

closure of the Motel did not cause the Kuzams to lose any equity through mortgage foreclosure. In addition, the jury found that $0 would constitute "full compensation" for the value of the Motel structures at the time of the Motel's demolition.

The Kuzmas present the following issues on appeal: 1) whether the jury's verdict was basedd upon the evidence; 2) whether the Kuzmas were entitled to a twelve member jury under Florida law; 3) whether Florida law required the Kuzmas to exhaust administrative remedies before filing inverse condemnation proceedings against the City; 4) whether the jury instructions were defective; and 5) whether the district court should have admitted certain exhibits into evidence over the Kuzmas' objections regarding the exhibits' relevancy, materiality and potential prejudicial effect. For the following reasons, we affirm the district court.

We find that the jury's verdict was based upon the evidence. The standard for reviewing a denial of a motion for judgment notwithstanding the verdict is the same as that applied by the trial court. *King v. Exxon Co., U.S.A.*, 618 F.2d 1111, 1116 (5th Cir. 1980). The denial must be upheld unless all of the evidence, viewed in the light most favorable to the nonmoving party, cannot support the jury's verdict. *Id.*

Expert testimony provided by both sides indicated that the improvements could potentially have a zero value or a negative value because the Motel was ten years past its forty year useful life and because a buyer would likely want to remove the improvements to put the land to a different use. Mrs. Kuzma's statement that, in the two years the property was actively for sale, it only attracted two written offers, both of which contemplated demolishing the buildings, also indicated potential zero value. Thus, while the evidence could have potentially supported a finding that the improvements had value, it also could have

supported the jury's actual finding that the improvements had zero value.[2]

We also find that the Kuzmas waived their right to a twelve person jury. Because this issue involves a ruling as a matter of law, we will review it *de novo*. See *Mich. Millers Mut. Ins. Corp v. Benfield*, 140 F.3d 915 (11th Cir. 1998). In Florida, there is a statutory right to have a twelve person jury determine just compensation in condemnation cases. Fla. Stat. § 73.071(1) (2004). That right, however, may be validly waived by written or oral stipulation in open court. *Div. Of Admin. State of Fla. Dep't of Transp. V. Davis*, 511 So.2d 686, 688 (fla. 4th DCA 1987). At

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[2]One of the Kuzmas' arguments relise on the fact that the jury established a value of $72,000 for the Motel structures on the verdict form while it simultaneously returned a $0 verdict for the compensation for the improvements. These two findings could have possibly been inconsistent, although they could have also possibly been consistent because the evidence supported the jury finding that the value may have deteriorated to $0 from closing to demolition. Nevertheless, the Kuzmas have stated in their reply brief that they are not raising inconsistency as grounds for appeal. Furthermore, even if they were, this claim would be barred by their failure to raise it before the jury was discharged. See *Coralluzzo v. Educ. Mgmt. Corp.*, 86 F.3d 185, 186 (11th Cir. 1996) (per curiam).

the pretrial conference prior to the first trial, which included the inverse condemnation claim, the Kuzmas expressly stipulated to a jury of seven. The Kuzmas' only demanded a jury of twelve on the first day of trial, after the court has called to venire only large enough to produce a seven-person jury. The district court properly rejected the demand because the Kuzmas had waived this right.

We also find that we do not need to rule on the validity of the Kuzmas' inverse condemnation claim because we agree with the district court that this claim is moot because the jury found the motel improvements did not have any value as of the date of demolition.

Finally, we find that the district court's jury instructions and evidentiary rulings were in fact proper, and that any potential error in the jury instructions is moot. We review these rulings and instructions under an abuse of discretion standard. *Quiet Tech. DC-8, Inc. V. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1339-

40 (11th Cir. 2003); *Eskra v. Prvident Life and Accident Ins. Co.*, 125 F.3d 1406, 1415 (11th Cir. 1997). If the jury instructions do not accurately reflect the law, we review them under a *de novo* standard. *Eskra*, 125 F.3d at 1415.

We find that the district court's jury instructions accurately stated for the jury why the Kuzmas were seeking damages. The jury instructions specifically stated that a prior proceeding had determined that the City had unreasonably closed the Motel. In addition, the jury instruction on causation accurately reflects the law with respect to the element of causation in § 1983 cases, which requires that "[f]or damages to be proximately caused by a constitutional tort, a plaintiff must show that, except for that constitutional tort, such injuries and damages would not have occurred and further that such injuries and damages were the reasonably foreseeable consequences of the tortuous acts or omissions in issue." *Jackson v. Sauls*, 206 F.3d 1156, 1168 (11th

Cir. 2000).

We do note, without deciding, that the jury instruction stating that the jury should determine equity "at or near" the time of the Motel's closure, rather than at the time of its demolition, may have been erroneous. We believe that it could have been foreseeable that the value of the Kuzmas' equity could have increased or decreased from the time the Motel was closed to the time the Kuzmas lost their equity when the Motel was demolished. Nevertheless, we do not need to address this issue further because the jury determined that the closing of the Motel did not cause the mortgage foreclosure, thus making any equity determination moot.

Turning to the evidentiary issues, the district court properly admitted Exhibits 8, the Standard Unsafe Building Code, and 20, the City of Fort Myers Notice of Unsafe Certificate. The Kuzmas never objected to these exhibits on the exhibit list, and the Case Management and Scheduling Order required that all

objections to exhibits appear on the exhibits lists or be waived. Therefore, the district court properly determined that the Kuzmas waived any objections to these exhibits. See *Iervolino v. Delta Air Lines, Inc.*, 796 F.2d 1408, 1419-20 (11th Cir. 1986).

The district court also properly found that the Kuzmas waived their objections to the admission of Exhibits 21 and 22, both of which were correspondence between the Kuzmas' attorney and the Assistant City Attorney regarding the demolition. The Kuzmas withdrew their pretrial objections to these exhibits at trial, and consented to their admission, which waived their right to object on appeal under Fed. R. Evid. 103(a).

The district court also properly admitted Exhibit 18. This exhibit was a letter from Fort Myers Fire Department Chief Randolph Jordan to the Assistant City Attorney which described a meeting with the Kuzmas at which the Kuzmas indicated their willingness to have the Fire Department burn the motel as a training exercise. Such a letter is probative of the Motel's value,

which was directly at issue in this case.

The district court's admission of Exhibits 23-32 and Exhibit 52 was also proper. These exhibits were the tax returns for Kuzma Properties, Inc. And the Kuzmas individually, for the years 1996 through 2000. These exhibits were relevant to the issue of whether or not the closure of the Motel or the Kuzmas' independently dire financial situation caused the foreclosure. These exhibits thus had considerable probative value, were not unfairly prejudicial, and were properly admitted.

For similar reasons, the district court properly admitted Exhibit 33, a letter that Mrs. Kuzma wrote to the then-mayor of Fort Myers, Bruce Grady, seeking his assistance in getting a traffic light installed at the intersection where the Motel was located. The letter describes the decline of business at the Motel, the increase in violent crime in the area surrounding the Motel, the pledge of equity in the Motel property to finance new business in Cape Coral, the Kuzmas' inability to keep up with their bills.

and their desire to destroy the Motel and get their equity out. Because this letter was probative as to the value of the Motel and the land, as well as to what might have caused the foreclosure (i.e., the closure of the Motel or the Kuzmas' independent financial problems), the district court properly admitted it, and it did not unfairly prejudice the Kuzmas.

Finally, the Kuzmas object to the admission of Exhibit 14, the Notice of Unsafe Building, but the district court did not in fact admit this exhibit. Therefore, we do not need to rule on this issue. Therefore, we AFFIRM.

AFFIRMED.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
NOVEMBER 29, 2005
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 05-10844-II & 05-10846-II

NANCY A. KUZMA,
TIMOTHY A. KUZMA,

Plaintiffs-Counter-
Defendants-Appellants,

versus

CITY OF FORT MYERS,
a Florida municipal corporation,

Defendant-Counter
Claimant-Appellee.

On Appeal from the United States District Court for the Middle District of Florida

Before: CARNUS, MARCUS and WILSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s

UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

Amendment VII of the United States Constitution

In Suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Amendment XIV of the United States Constitution

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. Amend. XIV, §1.

FILED IN OPEN COURT

October 28, 2004 10:00 a.m.

IN THE U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

AKJ

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

NANCY A. KUZMA and TIMOTHY A. KUZMA, Husband and Wife,

Plaintiffs,

-vs- **Case No. 2:01-cv-258-FtM-29DNF**

CITY OF FORT MYERS, a Florida municipal corporation,

Defendant.

_____/

SPECIAL INTERROGATORIES TO THE JURY

We, the jury find the following from a preponderance of the evidence:

Plaintiffs' Loss of Equity, If Any, Attributed to Closure of the Motel.

1. What amount of equity, if any, did the Plaintiffs have in the property as of December 6, 2000? (Fill each line of the calculation below)

   a. Fair market value of the property composed of:

Land:	$510,000.00
Motel Structures:	$72,000.00
Total	$582,000.00

   b. Amount of encumbrances (for example: mortgages, liens, accrued taxes, etc.):

Total	$555,000.00

   c. Amount of equity (that is: total fair market value of the property minus total amount of encumbrances):

Amount	$27,000.00

2. Did the Plaintiffs lose equity in the property through mortgage foreclosure?

   Answer: ____ Yes X No

3. Was the mortgage foreclosure proximately caused by the motel being closed by the Defendant?

Answer: ____ Yes X No

Amount that Would Constitute "Full Compensation" for the Motel, itself.

1. What amount, if any, would constitute "full compensation" for the value of the motel structures at the time of their demolition?

Amount: $0

SO SAY WE ALL.

Norman Kay
Foreperson

DATED: 10/28/2004

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
October 27, 2004
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

03-11382-DD & 03-12535-DD

NANCY A. KUZMA,
TIMOTHY A. KUZMA,

Plaintiffs-
Counter-Defendants-
Appellants,

versus

CITY OF FORT MYERS,
a Florida municipal corporation,

Defendant-
Counter-Claimant
Appellee.

On Appeal from the United States District Court for the Middle District of Florida

BEFORE: WILSON and FAY, Circuit Judges, and MILLS, District Judge.

BY THE COURT:

Appellee's motion to remand Appellants' motion for appellate attorney's fees for disposition at the conclusion of the proceedings below, as provided in 11th Cir.R. 39-2(e), is GRANTED. See Hanrahan v. Hampton, 446 U.S. 754, 758, 100 S.Ct. 1987, 1990 (1980) (civil rights plaintiffs who succeeded on appeal in obtaining reversal for new trial are not "prevailing parties" for purposes of § 1988 fee award); see also Buckhannon v. West Virginia Department of Health and Human Resources, 532 U.S. 598, 121 S.Ct. 1835 (2001) (limiting definition of "prevailing party," as term is used in attorney's fee statutes, to one who has obtained either a judgment on the merits or a court-ordered consent decree).

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

NANCY A. KUZMA and TIMOTHY A. KUZMA, Husband and Wife,

Plaintiffs,

-vs- **Case no. 2:01-cv-258-FtM-29SPC**

THE CITY OF FORT MYERS, a Florida Municipal Corporation,

Defendant.

JUDGMENT IN A CIVIL CASE

Decision by Court.

IT IS ORDERED AND ADJUDGED

That pursuant to the Order entered October 20, 2004, judgment is entered in favor of the plaintiffs Nancy and Timothy Kuzma and against the defendant, City of Fort Myers, for costs in the amount of $4,770.65.

Date: November 1, 2004

SHERYL L. LOESCH, CLERK

By: /s/ Sherry Upshaw, Deputy Clerk

c: All parties and counsel of record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
DIVISION

NANCY A. KUZMA and TIMOTHY A. KUZMA, husband and wife,

Plaintiff,

-vs- **Case No. 2:01-cv-258-FtM-29DNF**

CITY OF FORT MYERS, a Florida municipal corportation,

Defendant.

ORDER

This case concerns a dispute over the closure and demolition of a motel in Fort Myers, Florida. In the course of two jury trials, this case has developed to the point where all factual issues have been decided.

Shortly before the second trial, however, Plaintiffs Nancy and Timothy Kuzma ("Kuzmas") filed a Motion for Summary

Judgment (Doc. 250) and Defendant City of Fort Myers ("City") filed one (Doc. 258) as well. The cross motions raised an issue of law as to whether the City committed inverse condemnation when it demolished a motel owned by the Kuzmas. Because trial on the issues of fact might independently resolve the case, the Court reserved ruling on the cross motions.

The second trial resulted in a verdict favoring the City on all counts. Now, the Kuzmas have filed a Motion for Mistrial, New Trial, and Judgment Notwithstanding the Verdict (Doc. 295) and the City has filed an Opposition (Doc. 297) thereto. In the final analysis, there is no basis for a new trial or for judgment notwithstanding the verdict, and the cross motions for summary judgment are moot.

I. BACKGROUND

The Kuzmas purchased and began operating the Edisonian Court Motel ("motel") in 1984. The motel was situated on State Road 41, which used to be a major artery of business and tourist

traffic through the City. With the opening of Interstate 75 and changes in the local market, the motel's clientele shifted over the years from short-stay tourists to longer-stay, low-income residents. Crime and vandalism developed into an ongoing problem, which affected the Kuzmas' motel business.

In 1997, the Kuzmas ceased operating the motel through a partnership and began operating the motel through a corporation, Kuzma Properties, Inc., ("the Corporation"). After 1997, the

motel business was reported to the Internal Revenue Service on the Corporation's tax returns; and, for the years 1998 through 2000, those returns reflected net losses. The Kuzmas' individual income tax returns for the same years also indicated significant business losses. In short, by 2000, the motel had experienced a significant financial decline.

In addition, the motel property bore significant financial encumbrances. In late 2000, the motel secured a first mortgage of approximately $475,000. In 1997 and 1998, the Kuzmas also pledged the motel as partial security for loans of $75,500, $315,000, and $32,000 to finance a multi-franchise restaurant complex in Cape Coral, Florida. By late 2000, the Kuzmas had recently expanded or were still in the process of expanding the restaurant business and the related mortgages had not been substantially repaid.

Between business losses and a significant debt load, the Kuzmas were financially strapped. As examples, the property tax obligations for the motel were in arrears for the tax years 1997 through 2000; before October 2000, the Kuzmas defaulted on their obligation under the mortgages to carry insurance on the restaurant property; and, in November 2000, the Kuzmas began defaulting on the payments for at least one of the restaurant mortgages. The totality of circumstances, including the fact that

the Kuzmas had tried to sell the motel for years before late 2000, suggest that by December 2000 the Kuzmas were in dire financial trouble.

The City is a municipal corporation with the statutory police powers to safeguard public health, safety, and welfare in Fort Myers, Florida. Consistent with its police powers, the City validly adopted the Standard Unsafe Building Abatement Code (1985) ("the Code"), Section 21-121 of the City of Fort Myers Growth Management Code, well-before the foregoing events. At all relevant times, the Code provided both a procedure to order the demolition of unsafe structures and a procedure to appeal such orders.

On December 6, 2000, City police officers and various government inspectors arrived unannounced at the motel. Inspectors from the Florida Department of Business and Professional Regulation, Division of Hotels and Restaurants ("DBPR"), and City zoning and building officials inspected the

motel. The motel was vacated and closed following the inspections.

On December 7, 2000, the DBPR issued and served on the Kuzmas' an Order of Emergency Suspension of License and Closure. (Def. Trial Ex. 30). The Order's opening paragraph stated, "This Order is based on the Director's determination that continued operation of this establishment constitutes a severe and immediate threat to public safety and welfare." (*Id.*) The Order officially closed the motel.

Also on December 7, 2000, the City issued the Kuzmas a letter reciting the City's determination that the motel was unsafe and that the motel must be demolished. (Def. Trial Ex. 33). The letter gave the Kuzmas a 60-day deadline to arrange the demolition. Enclosed with the letter was an "Appeal Filing Form." The letter further notified the Kuzmas that an appeal could be made "to the Fire and Building Appeals Board by filing a written notice, along with $150.00 filing fee with the Building

Official, within 30 days of receipt of this notice." (*Id.*)

On December 9, 2000, the Kuzmas received the City's determination letter. At the time, the Kuzmas were represented by counsel. The Kuzmas, nevertheless, did not undertake an appeal of the City's determination, despite actual notice of the opportunity to do so. And, on April 20, 2001, after some delay to give the Kuzmas an opportunity to sell the motel property, the City

finally demolished the motel structures and improvements. Only afterward did the Kuzmas formally challenge the City's actions. They did so by filing this lawsuit on May 21, 2001.

Later in 2001, the lender for the restaurant business foreclosed on the restaurant property. Although the value of the restaurant property was insufficient to satisfy the restaurant mortgages, the lender released its liens against the motel property, which was supposed to serve as partial collateral for the restaurant mortgages. Soon afterward, the first mortgage holder on the (then

vacant and cleared) motel property foreclosed his mortgage and took title to the motel property at the foreclosure sale. There is no indication that the first mortgage holder took the motel property by bidding more than the outstanding balance of the first mortgage.

A. The First Trial

In November 2002, the Court convened a jury trial on the Kuzmas' following four claims: a Fourteenth Amendment procedural due process claim for closure of the motel without notice or an opportunity to be heard: two separate Fourth Amendment claims for unreasonable closure and for unreasonable demolition of the motel; and a state law inverse condemnation claim for demolition of the motel. Based, in part, on a stipulation of the Kuzmas' counsel, the Court empaneled a jury of seven persons to hear the case.

During the Kuzmas' presentation of evidence, the Court

made certain evidentiary rulings relevant to the issue of whether the Kuzmas suffered damages from closure and demolition of the motel. The Court excluded testimony of the motel's value both from the Kuzmas' proffered appraisal expert, Melissa Creasy, and from Mr. Kuzma. The Court also excluded the City's response to "Interrogatory #26," which reflected the county tax appraiser's valuation of the motel. Because, after these rulings, there was no evidence that the Kuzmas suffered actual damages from the motel's demolition, the Court granted judgment against the Kuzmas on their state-law, inverse-condemnation claim.

The Court further determined that the Kuzmas did not suffer monetary damages from the City's closure of the motel[1]. The Court rejected the Kuzmas' argument that the closure of the motel caused the Kuzmas to lose equity in the property through

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[1] The Corporation, which operated the motel, was not a party to the litigation. The Kuzmas also claimed emotional damages resulting from the City's conduct. Ultimately, the jury found that the Kuzmas did not suffer emotional damages. (Doc. 143 at 3).

foreclosure. The Court, in essence, found a lack of proximate causation between the City's closure of the motel in December 2000 and the foreclosure of the motel property that took place in October 2001.

At the close of the first trial, the Court submitted to the jury the Kuzmas' Fourteenth Amendment procedural due process claim for closure of the Motel and their Fourth Amendment claims for closure and for demolition of the Motel. The jury returned a verdict finding that the City had not violated the Kuzmas' right to procedural due process by closing the motel and that the City's demolition of the motel was reasonable under the Fourth Amendment. The jury did find, however, that the City's closure of the motel violated the Fourth Amendment. On the issue of resulting damages, the jury found that the Kuzmas were entitled to nominal damages of $40,000.00. To comport with the concept of nominal damages, the Court reduced the jury's award to $1.00 in the final judgment.

The Kuzmas thereafter appealed the Court's final judgment based on the aforementioned evidentiary and proximate-cause determinations. But the Kuzmas did not appeal the jury's verdict

or the Court's reduction of the verdict to nominal damages.

On discrete issues, the Appeals Court reversed and remanded the case for further proceedings not inconsistent with its determination that this Court: (1) erred in excluding the testimony of Ms. Creasy (the Kuzmas' proffered real estate valuation expert), in excluding "Interrogatory #26," and thus in entering judgment as a matter of law on the Kuzmas' state-law, inverse-condemnation claim; and (2) erred in dismissing, as a matter of law, the Kuzmas' claim that the City's closure of the motel caused the Kuzmas' to lose equity in the motel property through foreclosure.

B. The Second Trial

Only the Kuzmas' Fourth Amendment motel-closure

claim and their state-law, inverse condemnation claim were remanded to this Court. In light of Appeals Court's decision, this Court convened another jury to resolve three principal issues of fact: (1) whether the Kuzmas had equity in the motel, (2) whether the City's closure of the motel caused the Kuzmas to lose equity, if any; and (3) the amount of just compensation for the motel, if the Court were to find that the City committed inverse condemnation by demolishing the motel[2]. As with the first trial, the Court empaneled a jury of seven persons.

On the whole, the presentation of evidence fell into two major categories: (1) lay and expert opinion as to the value of the motel property (including the land and motel structures) as well

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2 In regard to the inverse-condemnation claim, the Court had reserved ruling on the parties' cross motions for summary judgment, which raised the court-determinable issue of liability. *See Department of Agric. and Consumer Servs. v. Mid-Florida Growers, Inc.*, 521 So.2d 101, 104 (Fla. 1988) (trial court in inversing condemnation suit is trier of all issues, legal and factual, except the issue of just compensation); *see also* FED. R. CIV. P. 71A(h).

as the amount of liens and encumbrances against the motel at the time of its closure, and (2) the financial condition of the Kuzmas' businesses.

Ms. Creasy testified as an expert witness for the Kuzmas that the motel property was worth $791,900, composed of $540,700 for the land and $251,200 for the motel structures. Ms. Creasy arrived at her opinion as to the motel's value based solely on the sales-comparison approach – that is, she used the adjusted sales price of other comparable properties. On cross-examination, however, it became clear that Ms. Creasy had not even considered the income-capitalization approach to valuation – that is, an analysis of the motel's value as an income-producing asset.

The Kuzmas also introduced one of the City's discovery responses, which indicated that the Lee County Property Appraiser valued the motel structures at $72,240 for ad valorem tax purposes.

Finally, Ms. Kuzma testified in the Kuzmas' case-in-chief

and was later recalled as a rebuttal witness. Besides giving her lay opinion as to the motel's value, Ms. Kuzma testified mostly about the background of the motel and the later restaurant business. She conceded many facts tending to show the motel's decline, the motel's property tax arrearages, and the heavily leveraged financial condition of the Kuzmas' businesses before they failed[3].

The City called Woodward Hanson as an expert witness as to the motel's value. Based on the income-capitalization approach – analyzing the motel's actual net income – as well as the sales-comparison approach to valuation, he opined that in December 2000 the motel property was worth $550,000, composed of $510,000 for the land and $40,000 for the motel structures as an ongoing concern.

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3 The Court notes in passing that Ms. Kuzma's testimony was rife with vituperative and unprovoked attacks against the City and its counsel.

The only other witness was a bank representative who testified as to the cross-collateralized restaurant mortgages that in December 2000 encumbered both the restaurant business and the motel. He testified that approximately $59,000 was the amount by which the restaurant mortgages effectively encumbered the motel in December 2000.

Throughout most of the trial, the Kuzmas' counsel, William Powell, persistently added an ingredient of disruptive commentary and conduct. At various turns, Mr. Powell made a point of expressing his displeasure with the Court's rulings through a raft of repetitious speaking objections. Mr. Powell, furthermore, stooped to physical antics, most notably, exaggerated

grimaces of disgust and hands-prone, open-mouth expressions of disbelief while facing the jury[4]. By all appearances, Mr. Powell's

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[4] Mr. Powell has put his behavior at issue by having the unmitigated temerity to emphasize in the Kuzmas' Motion for

behavior was calculated to influence the jury.

At the close of the City's case, the Court instructed the jury on the law they were to consider in deciding the case. Thereafter, the parties gave their closing arguments, and the jury retired to deliberate the Kuzmas' claims. Ultimately, the jury completed the following verdict:

We, the jury find the following from a preponderance of the evidence:

Plaintiffs' Loss of Equity, if Any, Attributable to Closure of the Motel.

1. What amount of equity, if any, did the Plaintiffs have in the property as of December 6, 2000? (Fill each line of the

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New Trial: "I realize that I probably did grimace or show surprise and question your ruling by my expression. I looked to the jury to be sure that the jury was not watching my response, being embarrassed by it, and the jury was focused on the witness, not me, at the time." For the record, only the wilfully blind could have missed Mr. Powell's ostentatious displays of contempt. Mr. Powell's attempt to put a positive spin on his behavior is patently disingenuous.

calculation below)

a) Fair market value of the property composed of:

Land: $ 510,000

Motel structures: $ 72,000

Total $ 582,000

b) Amount of encumbrances (for example: mortgages, liens, accrued taxes, etc.):

Total $ 555,000

c) Amount of equity (that is: total fair market value of the property minus total amount of encumbrances):

Amount $ 27,000

2. Did the Plaintiffs lose equity in the property through mortgage foreclosure?

Answer: _____ Yes ____X____ No

3. Was the mortgage foreclosure proximately caused by the motel being closed by the Defendant?

Answer: _____ Yes ____X____ No

Amount that Would Constitute "Full Compensation" for the Motel, itself.

1. What amount, if any, would constitute "full compensation" for the value of the motel structures at the time of their demolition?

   Amount: $0

(Doc. 290). After this verdict was read, the Court polled the jury at the request of counsel for the Kuzmas. And, after the jurors confirmed their unanimous verdict, the Court excused the jury without objection.

II. ANALYSIS

The Kuzmas have now filed a Motion for Mistrial, New Trial, and Judgment Notwithstanding the Verdict (Doc. 295), in which they allege that various errors unfairly and materially prejudiced the second trial and led to an allegedly inconsistent verdict. In challenging the general outcome of the trial, the

Kuzmas raise the following issues:

(1) whether the Court committed reversible errors in its instructions to the jury,

(2) whether the Court committed reversible error in admitting into evidence certain of the Kuzmas' tax returns, and

(3) whether the Court's conduct, in regard to one comment at trial, deprived the Kuzmas of a fair trial.

In challenging the outcome of the trial in regard to their inverse-condemnation claim, the Kuzmas further raise the following issues:

(1) whether the Court committed reversible error in convening a jury with fewer than twelve persons in regard to the Kuzmas' inverse-condemnation claim, and

(2) whether the jury's verdict is inconsistent and

unsupportable as to the value of the motel structures in April 2001.

A. Instructions, Evidence, and the Court's Comment

(1) Instructions to the Jury

The Kuzmas argue that the Court's instructions to the jury were prejudicial in two respects. First, the Kuzmas assert that the jury was not adequately informed that the City "violated the Kuzmas' right to be free from unreasonable seizure when the City closed or caused the closure of the [motel]." (Doc. 295 at 9). Second, the Kuzmas argue that the Court's instructions improperly

required the Kuzmas to prove "that they had equity in the property at or near the time of the motel's closure." (*Id.* at 11).

Trial courts have wide discretion to fashion jury instructions so long as the instructions accurately reflect the law. *Eskra v. Provident Life & Acc. Ins. Co.*, 125 F.3d 1406, 1415 (11th Cir. 1997). "If the instructions as a whole correctly instruct

the jury, even if technically imperfect, no reversible error is committed." *Id.* A court's instructions to the jury will not be a basis for new trial unless there is "a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations." *Cleveland v. Home Shopping Network, Inc.*, 369 F.3d 1189, 1196 (11th Cir. 2004) (citations omitted).

As an introduction to the case, the Court informed the jury panel:

> In a previous proceeding, it has been determined that the defendant the City of Ft. Myers, closed or caused the closure of the . . . motel, that that closure was intentional and unreasonable. And your duty in this particular proceeding will be to determine whether as a result of that closure . . . the Kuzmas sustained damages by reason of lost equity in the property.

Furthermore, before counsel presented their closing arguments, the Court instructed the jury that "[i]n a prior proceeding, it was determined that the City unreasonably caused the closure of the motel in December of 2000." (Doc. 282 at 7).

The Appeals Court remanded this case on discrete issues, not with a wholesale mandate for retrial. The jury in the second trial was not empaneled to decide whether the City violated the Kuzmas' Forth Amendment right to be free from unreasonable seizures; rather, that was an issue the jury in the first trial had already decided. The first jury concluded that the City's closure of

the motel violated the Kuzmas' Fourth Amendment right to be free from unreasonable government seizures, but that, under the same standard, the City's demolition of the motel was reasonable.

The jury in the second trial was not misled in regard to the City's wrong, and they were disabused of any notion that they might have been empaneled to determine liability. The second jury was told of the wrong – unreasonable closure – and, consistent with the remand mandate, asked to decide whether the Kuzmas sustained damages as a result of the closure. If the

Court's instructions had delved into the standards and character of the City's wrong, the Court would have embarked on the slippery slope of retrying the first trial. Minimal fairness would then also require an instruction that the City's demolition of the motel was found to be reasonable by the first jury. As it stands, the Kuzmas were spared an instruction as to that nettlesome fact, and there is no reason to believe that the second jury failed to grasp the unambiguous instruction given by the Court.

As the Kuzmas point out, the Court also instructed the jury to "decide whether the Kuzmas have proven, by a preponderance of evidence that they had equity in the property at or near the time of the motel's closure." (Doc. 282 at 8) (emphasis added). In essence, the Kuzmas seek a new trial on the theory that the jury should have determined equity as of ten months later, in October 2001, after the restaurant mortgages had been released from the motel property and about the time of the motel property's foreclosure. The ultimate flaw in this assignment

of error is its irrelevance.

Regardless of the date for valuing equity in the motel property, a dispositive issue is whether the closure of the motel caused the foreclosure of the motel property. On that issue, the jury found a lack of causation[5].

Although the Kuzmas argue that setting the equity-valuation date as of the motel-closure date prevented them from proving causation, the Kuzmas conflate their alleged injury with the City's conduct and thereby assume the existence of causation to prove causation. The bookends of the causation analysis are the unreasonable closure of the motel, at one end, and the foreclosure of the motel property, at the other. No doubt, the Kuzmas would like the foreclosure date (the Kuzmas' proposed equity-valuation date) to serve as a proxy for the date of the City's conduct – that

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5 The jury found that the Kuzmas had $27,000 in equity in the motel property on the date the motel was closed, so it cannot be said that the jury perceived the causation issue to be moot and, by default, found causation to be lacking.

would synchronize the City's conduct and the Kuzmas' alleged injury[6]. However, causation asks whether certain conduct was the legal cause of an injury. The jury was properly instructed on this point of law[7],7 and the jury found that the City's closure of the motel did not cause the foreclosure of the motel property.

(2) The Kuzmas' Tax Returns as Evidence

As a basis for new trial, the Kuzmas challenge the Court's decision to admit certain of the Kuzmas' tax returns into

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The fallacy of setting the equity-valuation date as of the date of foreclosure is in the disregard of intervening events. Although the Kuzmas did not (and could not) seek damages from the City for loss of their restaurant business, the Kuzmas rely on the foreclosure of the restaurant mortgages (leading to the release of the restaurant mortgages from the motel property) as creating some equity the Kuzmas then allegedly lost through foreclosure of the motel property. By reference to a collateral loss, the Kuzmas' theory credits the City with creating equity and then taking it away. Under that theory, the equity-valuation issue is exceedingly muddled with causation, and causation is absent as a matter of law.

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Indeed, the Court incorporated, substantially verbatim, the Court of Appeal's statement of causation into the jury instructions.

evidence. The Kuzmas argue that the returns were irrelevant and prejudicial (suggesting that the Kuzmas were dishonest).

Relevant evidence is "evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401. Relevant evidence is generally admissible, *id.* 402, but it may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." *id.* 403.

In the instant case, a key issue was whether the City's closure of the motel caused the Kuzmas to lose equity through the foreclosure of the motel property. The Kuzmas' tax returns were probative of the negative financial state of the Kuzmas' businesses in the years before the motel was closed. The tax returns provided a reasonable basis from which to infer, despite Ms. Kuzma's claims to the contrary, that the Kuzmas' businesses, including the motel, were in such a downward financial spiral that

the motel was destined to fail, regardless of the City closing it. The City did not in any way suggest that the tax returns were probative of any irrelevant fact (e.g., dishonesty). Although the tax returns were clearly adverse to the Kuzmas' case, they were not *unfairly* prejudicial within the context of Rule 403[8]. *See id.*

(3) The Court's Conduct at Trial

The Kuzmas challenge the Court's conduct at trial in other respects as well. At one point in her testimony, the Kuzmas' expert witness, Ms. Creasy explained why she did not rely on the

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8The Kuzmas suggest that the Court has prevented them from raising other evidentiary issues because of an issue regarding the trial transcript. Mr. Powell requested transcript segments for each reference to an exhibit, any related objection, and the Court's rulings on same. Essentially, Mr. Powell wanted the court reporter, as a conscripted paralegal, to scour the record for corresponding, but often separated, references. As is customary, the court reporter offered to transcribe whatever block segments counsel designated, but Mr. Powell, in his typically obstreperous manner, declined.

county tax appraiser's valuation of the motel property[9]. Among other reasons, she indicated that county tax appraisers typically value real estate from about 70 to 100 percent of its actual value and such appraisals are typically under market. After the City objected to Ms. Creasy's "undermarket" statement, the Court overruled the objection, said "Let's move on. It's under market," and thereafter offhandedly mused that he wished that were the case with his home in Boca Grande (a town in nearby Charlotte County). Although the Kuzmas did not contemporaneously object to the Court's comment at trial, they now claim that it undermined Ms. Creasy's testimony to such a degree as to require a new trial.

A federal judge is more than a mere moderator of proceedings. *Coats & Clark, Inc. v. Gay*, 755 F.2d 1506, 1511

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9 In essence, the Kuzmas were asking their expert, in a leading fashion, to impeach evidence that the Kuzmas had offered (the answer to Interrogatory #26) in support of their case.

(11th Cir. 1985). A federal judge "possesses broad powers to comment on the evidence, question witnesses in order to elicit facts not yet adduced or clarify those previously presented, and to maintain the pace of the trial . . . ." *Id.* at 1511-12 (citation and internal quotation marks omitted). If a party does not contemporaneously object to a judge's conduct, the party cannot establish a deprivation of the right to a fair trial, unless the judge plainly and obviously deviated from neutrality. *Id.* at 1512. In determining whether that occurred, the inquiry is not focused narrowly on instances of allegedly improper conduct; rather, it depends on the record as a whole. *Id.*

From a review of the record, it is clear that the Court's comment did not deprive the Kuzmas of a fair trial[10]. The Court

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[10] The Kuzmas' motion also refers in passing to another comment the Court made. At one point, Mr. Powell interrupted cross-examination with the following speaking objection: "Your Honor, are we kind of getting off the track of valuation of property? Isn't that what were here for, is to determine the value? We're going way off into left field now." The Court, in

overruled the City's objection and permitted Ms. Creasy to testify that county tax appraisals are typically under market. The Court reiterated in its ruling, "It's under market," and the Court vaguely alluded, in a humorous vein, to the anecdotal counter instance of his own residential property. Ms. Creasy appraised the motel under the sales comparison approach, and she had testified at length about the various elements she thought made certain other

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turn, dismissed Mr. Powell's unnecessary speech and interruption with the following mildly sarcastic comment: "Well, I kind of think this whole thing is in left field. I think I'm going to have to allow some latitude here Mr. Powell. I'm not sure where we're going but I don't know until we go a little bit." Mr. Powell let the comment pass without contemporaneous objection, and the Court is not surprised that the Kuzmas do not press that comment as a basis for new trial. Courts have broad discretion to keep the proceedings moving without having to take recesses to admonish counsel. *Id.*

A further observation seems due. The cold transcript of the trial does not reflect the needling antagonism and contemptuous disdain that seethed from Mr. Powell throughout the trial. Thankfully, seldom has the Court seen counsel poison the atmosphere of a proceeding in that manner. It likely led his own clients into the mistake of acting intemperately at trial.

commercial property sales comparable indicators of value. She did not rely on the tax appraisal, and the Court's comment, on its face, had little or no probative value to mistake it as a criticism of the general basis for Ms. Creasy's opinion. Furthermore, the Court instructed the jury that in arriving at a decision of the facts, they were to disregard anything the Court may have said during the trial. (Doc. 282 at 2).

Quite apart from the Court's comment, the jury had ample reason to give the motel structures a value closer to the one determined by the county tax appraiser. Ms. Creasy's testimony was not the Kuzmas' sole or best evidence for the value of the motel; indeed, the Kuzmas were the ones who insisted on introducing the county tax appraiser's valuation into evidence. Ms. Creasy's testimony was, by comparison, patently defective. She admittedly failed to analyze the motel's income, even though the motel was a commercial property used only for an income-producing purpose. The City's expert (Mr. Hanson), on the other

hand, used both the income-capitalization **and** sales-comparison approaches in valuing the motel. In addition to various other comparative weaknesses, it was obvious that Ms. Creasy did not take into account income, a crucial indicia of value[11].

B. The Inverse-Condemnation Claim

(1) The number of jurors

The Kuzmas assert that the Court deprived them of the right to a twelve-person jury for the trial of their inverse-condemnation claim. Counsel for the Kuzmas first demanded

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11 Although the issue is now moot, based on the full record at trial, including testimony the Court elicited from Mr. Hanson outside the presence of the jury, the Court is even more convinced that it was appropriate to exclude Ms. Creasy from testifying in the first trial. Numerous authorities on appraisal indicate that the income-capitalization approach to valuation is an integrated, interrelated, and inseparable approach to producing a reliable appraisal of the market value of income-producing property. *See, e.g.*, APPRAISAL INSTITUTE, APPRAISAL OF REAL ESTATE 409 (10th ed. 1992). Ms. Creasy prepared an "expert" opinion based on a designedly incomplete methodology not acceptable in commercial transactions nor consistent with the precepts for rendering reliable real estate appraisals.

such a jury on the morning the second jury trial convened, a point at which the Court had an insufficient pool of perspective jurors to comply. At that point, the demand was unexpected because the first trial in this case had been before a seven-person jury originally convened to decide, *inter alia*, the Kuzmas' inverse-condemnation claim[12]. The Court has since reviewed what transpired at the August 20, 2002 pretrial conference before the first trial (Doc. 84) and finds that counsel for the Kuzmas specifically waived a twelve-person jury at that point. Accordingly, as of the morning the second trial commenced, the Kuzmas had long since waived the right to a twelve-person jury.

(2) The jury's verdict

The Kuzmas seek judgment notwithstanding the verdict

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It appeared then, and more so now, that Mr. Powell interposed his objection to a seven-person jury in an improper attempt to delay or sidetrack the proceedings because of his disagreement with the manner in which the Court proposed to limit the trial issues.

regarding the jury's valuation of the motel structures for purposes of inverse condemnation. Specifically, the Kuzmas challenge the jury's finding that the motel structures were worth $0 at the time of demolition (April 2001) as allegedly inconsistent with jury's finding that the motel structures were worth $72,000 in December 2000. Although the Kuzmas did not object to the jury's verdict before the jury was excused, the Kuzmas now contend that the evidence clearly mandates that the motel structures were worth $72,240 in April 2001.

As a threshold issue of procedure, a party who challenges the consistency of a special verdict must raise the challenge before the jury is excused, a point before which any alleged inconsistency might be remedied without the burden of presenting evidence to a new jury. *Coralluzzo v. Education Mgmt. Corp.*, 86 F.3d 185, 186 (11th Cir. 1996). Because the Kuzmas failed timely to raise their challenge, it is barred. *Id.*

As to the substance of the challenge, in determining

whether judgment should be entered notwithstanding a jury's verdict, the Court should consider all the evidence in the light and with all reasonable inferences in favor of upholding the jury's verdict. *See King v. Exxon Co.*, 618 F.2d 1111, 1116 (5th Cir. 1980)[13]. The Court should grant judgment notwithstanding the verdict only if the facts and inferences so strongly and overwhelmingly favor the alternative verdict sought that the Court believes that reasonable jurors could not arrive at a contrary verdict. *Id.* If there is substantial evidence to support the original verdict – that is, evidence of such quality and weight that reasonable and fair-minded persons might reach different conclusions in the exercise of impartial judgment – the original verdict should not be disturbed. *Id.*

The jury finding challenged by the Kuzmas concerns the

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[13] Decisions of the Fifth Circuit prior to October 1, 1981 are binding precedent on this Court. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

value of a motel, when it was demolished in April 2001. At trial there was substantial evidence that the motel was in significant decline by late 2000. Among other evidence, Mr. Hanson, the city's expert, testified that the motel was nearing the end of its useful life, and that the property would have greater value cleared of the motel structures and put to a different use. Mr. Hanson appraised the motel's structural value at $40,000 in December 2000, as an ongoing concern. By late April 2001, however, the motel had been sitting empty and idle for over four months. Thus, the evidence does not clearly compel a finding that the motel structures were still worth $72,000 or that they had any value at all

by April 2001. Because a reasonable jury could have concluded that the motel structures had no remaining value in April 2001, the Kuzmas' motion for judgment notwithstanding the verdict is without merit.

IV. CONCLUSION

Based on the foregoing analysis, the Court finds that the jury was properly instructed on the law applicable to the Kuzmas' claims, the Kuzmas' tax returns were clearly relevant and admissible, the Court's conduct did not deprive the Kuzmas of a fair trial, the Kuzmas waived a twelve-person jury for their inverse-condemnation claim, the Kuzmas failed timely to object to any alleged inconsistency in the jury's verdict, and the jury had substantial evidence to support their verdict. The jury verdict establishes that the City's closure of the motel did not cause damage to the Kuzmas and the motel did not have any value as of the date it was demolished.

Furthermore, because the motel did not have any value as of the demolition date, the issue of whether the City committed inverse condemnation is moot[14]. Accordingly, it is hereby,

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[14] Although the issue is now moot, the Kuzmas' inverse-condemnation claim otherwise appears invalid. While not every exercise of government police power will justify the uncompensated destruction of private property to protect public

ORDERED that the Kuzmas' Motion for Mistrial, New Trial, and Judgment Notwithstanding the Verdict (Doc. 295) is **DENIED.** The Kuzmas' Motion for Summary Judgment (Doc. 250), the City's Motion for Summary Judgment (Doc. 258), and

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health, safety, and welfare, such action is justified when reasonably necessary to avoid a threat to public welfare. *See Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470, 488, 491-92 (1987); *Rowland v. Martin*, 176 So. 545, 547 (Fla. 1937). Furthermore, a person is barred from contesting the substantive validity of executive acts of government, if the person fails to pursue an available and adequate administrate appeals procedure to challenge the decision. *See, e.g, Key Haven Associated Enters., Inc. v Board of Trs. of the Internal Improvement Trust Fund*, 427 So.2d 153, 157-58 (Fla. 1982) *superseded by statute on other grounds, Bowen v. Florida Dept. of Env't. Regulation*, 448 So.2d 566, 569 (Fla. 2nd DCA 1984).

The Kuzmas assert that the City's determination to demolish the motel – that is, the substantive application of the City's Code – was erroneous, unjustified, and inappropriate. (Doc. 250 at 4). The Kuzmas, however, failed to appeal that determination despite the availability of an appeals process, conclusively determined in this case to be adequate. The Kuzmas' challenge to the City's determination, therefore, appears to be an improper challenge to the City's substantive, factual determination that the motel's condition necessitated demolition to protect public welfare.

any other pending motions are **DENIED** as moot. The Clerk is directed to enter judgment for the Defendant, the City of Fort Myers, and to close the file in this case.

DONE and **ORDERED** in Chambers, Orlando, Florida on December 3, 2004.

/s Gregory A. Presnell
GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

NANCY A. KUZMA and TIMOTHY A KUZMA,

Plaintiffs,

vs. **Case No. 2:01-cv-258-FtM-29DNF**

THE CITY OF FORT MYERS,

Defendant.

JUDGMENT IN A CIVIL CASE

This action came on for jury trial before the Honorable Gregory A. Presnell, District Judge, presiding, and the issues have been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED that the Plaintiff take nothing, that the action be dismissed on the merits and that the defendant recover from the plaintiff its costs of action.

Date: Dec. 8, 2004.

SHERYL L. LOESCH, CLERK

By: s/Anita Justin
Anita Justin, Courtroom Deputy Clerk

Copies furnished to:

Counsel of Record
Unrepresented Party

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

NANCY A. KUZMA AND TIMOTHY A. KUZMA,

Plaintiffs,

vs. **Case No. 2:01-cv-258-FtM-29DNF**

THE CITY OF FORT MYERS,

Defendant.

ORDER

Following the first trial of this action, the Court entered an Order (Doc. 184) reducing the jury award to $1.00. That portion of the Order was not appealed. In that Order, the Court also granted Plaintiffs' motion for costs. Judgment for Plaintiffs in the amount of $1.00 was entered on February 12, 2003 (Doc. 185). On March 12, 2003, the Court entered an Order awarding Plaintiffs $10,360.02 in costs (Doc. 194). That cost award was

paid by Defendant and the Plaintiffs executed and filed a satisfaction (Doc. 220).

Thereafter, an appeal ensued. The Circuit Court reversed and remanded for subsequent proceedings and Plaintiffs were awarded appellate costs in the amount of $4,770.65 (Doc. 266 and 294). That obligation remains unsatisfied.

At the conclusion of the second trial on remand, the jury rendered a verdict for Defendant. By Order dated December 3, 2004, Plaintiffs' post-trial motions were denied (Doc. 298) and judgment was entered for Defendant (Doc. 299).

Defendant has now filed a Motion for Taxation of Costs (Doc. 301) incurred in connection with the second trial and seeks a set-off against the appellate cost judgment in favor of Plaintiffs. Plaintiffs object to this (Doc. 303), claiming that they were the overall prevailing party. Plaintiff also contest certain items of costs claimed by Defendant.

Although Plaintiffs only nominally prevailed at the first

trial, they received a full cost ward, which Defendant paid. They also received an award for appellate costs. But Plaintiff clearly did not prevail at the second trial.

This case has taken up an enormous amount of the Court's resources and undoubtedly a large chunk out of the City's litigation budget. Conversely, the return on Plaintiffs' investment of time and expenses over the past four years in litigating these claims is a judgment for $1.00. Clearly, plaintiffs are not the overall victors in this dispute. The Court therefore grants Defendant's motion for costs.

Defendant seeks costs in the amount of $5,693.81. This amount includes $2,236.55 for a transcript of the first trial and subpoena costs and fees for witnesses who were not called at trial. The Court therefore deletes these items and awards costs to Defendant in the amount of $3,351.16. This amount will be set off against the $4,770.65 due Plaintiffs, resulting in a net cost award in Plaintiffs' favor in the amount of $1,419.49. The Clerk

is directed to enter an Amended Final Cost Judgment accordingly.

DONE and ORDERED in Chambers in Orlando, Florida on December 22, 2004.

s/Gregory A. Presnell
GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies to:

All counsel of record

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAY 16, 2005
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-10844–II & 05-10846–II

NANCY A. KUZMA,
TIMOTHY A. KUZMA,

Plaintiffs-
Counter-Defendants-
Appellants,

versus

CITY OF FORT MYERS,
a Florida municipal corporation,

Defendant-
Counter-Claimant
Appellee.

Appeal from the United States District Court for the
Middle District of Florida

ORDER:

Appellant's motion for an extension of time to file their initial brief and record excerpts up to and including May 27, 2005, is DENIED. Appellant is GRANTED an extension to May 23, 2005.

/s/Ed Carnes
UNITED STATES CIRCUIT JUDGE

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUNE 8, 2005
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-10844–II & 05-10846–II

NANCY A. KUZMA,
TIMOTHY A. KUZMA,

Plaintiffs-
Counter-Defendants-
Appellants,

versus

CITY OF FORT MYERS,
a Florida municipal corporation,

Defendant-
Counter-Claimant
Appellee.

Appeal from the United States District Court for the
Middle District of Florida

ORDER:

Appellee's motion for an extension to, and including, July 13, 2005 to file their brief is granted.

s/
UNITED STATES CIRCUIT JUDGE

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JULY 27, 2005
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-10844–II & 05-10846–II

NANCY A. KUZMA,
TIMOTHY A. KUZMA,

Plaintiffs-
Counter-Defendants-
Appellants,

versus

CITY OF FORT MYERS,
a Florida municipal corporation,

Defendant-
Counter-Claimant
Appellee.

Appeal from the United States District Court for the
Middle District of Florida

ORDER:

Appellants' motion for an extension of time to file their reply brief up to and including August 29, 2005 is GRANTED.

/s/ Susan H. Black
UNITED STATES CIRCUIT JUDGE

[DO NOT PUBLISH]

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUNE 7, 2004
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-11382

D.C. Docket No. 01-00258-cv-FtM-29DNF

NANCY A. KUZMA,
TIMOTHY A. KUZMA,

Plaintiffs-
Counter-Defendants-
Appellants,

versus

CITY OF FORT MYERS,
a Florida municipal corporation,

Defendant-
Counter-Claimant
Appellee.

No. 03-12535

D.C. Docket No. 01-00258-cv-FtM-29DNF

NANCY A. KUZMA,
TIMOTHY A. KUZMA,

Plaintiffs-
Counter-Defendants-
Appellants,

versus

CITY OF FORT MYERS,
a Florida municipal corporation,

Defendant-
Counter-Claimant
Appellee.

Appeals from the United States District Court
for the Middle District of Florida

(JUNE 7, 2004)

Before WILSON and FAY, Circuit Judges, and MILLS*, District Judge.

PER CURIAM:

This case arises out of the seizure and demolition of the Edisonian Court Motel ("Motel") by the City of Ft. Myers ("City"). Nancy and Timothy Kuzma, the owners and operators of the Motel, filed a multi-suit claim against the City, alleging procedural due process and unreasonable seizure violations under 42 U.S.C. § 1983, and a state-law inverse condemnation claim based on the Motel's demolition. At the end of the trial, the district court granted judgment as a matter of law to the City on the inverse condemnation claim because the court found that the Kuzmas failed to provide evidence of the Motel's value.

The Kuzmas appeal the district court's grant of judgment as a matter of law, as well as three of the district court's

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*Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

evidentiary rulings. The Kuzmas also argue that the jury was entitled to hear and decide issues of causation, namely that the City's closure of the Motel resulted in the loss of the Kuzmas' equity in the property. Finding error with the district court's rulings, we reverse and remand.

Background

From 1984 until 1997, the Kuzmas operated the Motel, located on Cleveland Avenue in Ft. Myers, Florida, as a partnership. In 1997, the Kuzmas formed Kuzma Properties, Inc., a Florida corporation, through which the Kuzmas operated the Motel. At all relevant times, the Kuzmas continued to hold legal title to the real property and the Motel.

On December 6, 2000, several police cars arrived with building code officials to inspect the Motel. As a result of this inspection, Florida's Department of Business and Professional Regulation suspended the Kuzmas' motel license, and the City declared the Motel unsafe and ordered the residents to vacate the

premises.

The Kuzmas were later notified by the City that the Motel was to be demolished pursuant to the City's Nuisance Abatement Code. Although the Kuzmas received the notice and an enclosed appeal form, the Kuzmas did not appeal. On April 23, 2001, the Motel was demolished and the Kuzmas subsequently appealed.

During the trial, the district court made several critical evidentiary rulings that ultimately resulted in the Kuzmas' failure to introduce evidence of the value of the Motel. First, the district court excluded the testimony of the Kuzmas' expert real estate appraiser because it found that her methodology was unreliable. The district court then excluded the City's response to "Interrogatory #26," which provided the county appraiser's valuation of the property. Finally, the district court excluded Mr. Kuzma's testimony on the value of the Motel. As a result of these evidentiary rulings, the district court granted the City's Rule 50(a) motion for judgment as a matter of law on the inverse

condemnation claim, citing the Kuzmas' failure to produce evidence of the Motel's value.

The remaining claims were considered by the jury. The jury found that the City violated the Kuzmas' right to be free from unreasonable seizure when the City closed, or caused the closure of, the Motel. The jury found for the City on the remaining claims, which the Kuzmas do not challenge here. Although the district court ruled that as a matter of law, the Kuzmas suffered no actual damages, the jury awarded nominal damages in the amount of $40,000[1]. This appeal followed.

Discussion

We review the granting of a Rule 50(a) motion for judgment as a matter of law *de novo*. *Mendoza v. Borden*, 195 F.3d 1238, 1244 (11th Cir. 1999). In our review, we employ the

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[1] The City moved for a remittitur of the nominal damages to $1.00, which was granted by the district court. The Kuzmas do not challenge this determination on appeal.

same standard the district court applied and view the evidence in the light most favorable to, and with all reasonable inferences drawn in favor of, the nonmoving party. *See id.*

Evidentiary rulings are reviewed under the abuse of discretion standard. *United States v. Breitweiser*, 357 F.3d 1249, 1254 (11th Cir. 2004).

I

The Kuzmas argue that the issue of causation on the § 1983 claim for loss of equity in the property should have gone to the jury[2]. We agree and find that the Kuzmas' evidence is enough to create a jury issue regarding whether the City's seizure of the

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[2]The City claims that this argument was not raised before the district court. A review of the record indicates that the Kuzmas argued that they were "entitled to the equity in the property if the City unlawfully seized their property and unlawfully demolished their property[.]" (R. Vol. 16 at 947). The district court flatly rejected this argument, first because it believed there was no proof of equity, and second, because it found that equity was lost because the Kuzmas did not make mortgage payments, not because the City closed or demolished the Motel.

Motel caused the subsequent foreclosure and loss of equity.

It is well settled that without an adequate causal link between the alleged harm and the unlawful conduct, the Kuzmas' § 1983 case fails as a matter of law. *See Dixon v. Burke County, Ga.*, 303 F.3d 1271, 1275 (11th Cir. 2002) ("The connection between conduct and harm must be legally sufficient to satisfy notations of common fairness and policy . . . . [A] physical causal relationship . . . may still be too remote to fairly permit the imposition of civil liability.").

Guided by common law tort principles of damage and causation, our cases have recognized that § 1983 defendants are responsible for the natural and foreseeable consequences of their actions. *See Jackson v. Sauls*, 206 F.3d 1156, 1168 (11th Cir. 2000) (citing *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 305-06 (1986); *Malley v. Briggs*, 475 U.S. 335, 344-45 n.7 (1986) (stating that "§ 1983 should be read against the background of tort liability that makes a man responsible for the

natural consequences of actions"); *Carey v. Piphus*, 435 U.S. 247, 255-59 (1978)). For damages to be proximately caused by a constitutional tort, a plaintiff must show that, except for that constitutional tort, such injuries and damages would not have occurred and that such injuries and damages were the reasonably foreseeable consequences of the defendant's tortious acts. *See Jackson*, 206 F.3d at 1168.

The Kuzmas contend that the City's illegal seizure caused a chain reaction of events culminating in the loss of equity in the property. First, the City illegally closed, or caused the closure of, the Motel, a finding that the City does not challenge on appeal. As a result of this closure, the Motel stopped generating a monthly income of $11,000. While this income technically flowed to the non-party corporation, the evidence indicated it was used to pay the property mortgage, which was held by the Kuzmas. Without the income, the Kuzmas were unable to pay the mortgage and the mortgagee foreclosed on the property. The

Kuzmas contend that their evidence raises a jury issue regarding whether the loss of equity was a natural and foreseeable consequence of the City's illegal seizure of the property.

It is eminently foreseeable that the closure of an income-generating property, for whatever length of time, will result in a loss of income. Unlike *Dixon*, where we found no causal connection between act and harm, *see* 303 F.3d at 1275, the continuum between the City's actions and the Kuzmas' loss is not destroyed by the deliberate or autonomous action of a third party. Certainly, the mortgagee acted to foreclose on the property, but this action was a natural consequence of the Kuzmas' failure to pay, not the independent act seen in *Dixon*. *See id.* (noting that the votes of grand jurors and the action of a judge broke the causal chain between plaintiff's application for employment and discriminatory comments made in connection with plaintiff's application). A jury could find that it was reasonably foreseeable that this loss of income might result in the Kuzmas losing the

property due to foreclosure. The district court erred in its cursory dismissal of this argument.

II

A

The Kuzmas also challenged rulings excluding evidence on the alleged value of the Motel destroyed.

1

First, the Kuzmas contend that the district court abused its discretion in striking the expert testimony of its appraiser, Melissa Creasy, on the value of the Motel under *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

The district court excluded the Kuzmas' expert witness because it found that Creasy's methodology in determining value – the so-called "comparable sales" approach – was unreliable because she did not make adjustments for location of motel, condition or net operating income. Specifically, the district court stated that it was excluding her testimony because she did not

review data regarding the financial viability or income of the motel, and thus, her opinion was not the product of reliable principles and methods.

The burden of laying the proper foundation for the admission of expert testimony is on the party offering the expert, and the admissibility must be shown by a preponderance of the evidence. *McCorvey v. Baxter Healthcare Corp.*, 298 F.3d 1253, 1256 (11th Cir. 2002) (citing *Daubert*, 509 U.S. at 592, n.10). *Daubert* requires that trial courts act as "gatekeepers" to ensure that speculative, unreliable expert testimony does not reach the jury. In deciding whether these requirements of Federal Rules of Evidence 702 are met, *Daubert* instructs courts to consider: 1) whether the expert's theory can be and has been tested; 2) whether the theory has been subjected to peer review and publication; 3) the known or potential rate of error of the particular scientific technique; and 4) whether the technique is generally accepted in the relevant community. *Id.*

Of the three way appraisers commonly use to value property, two are relevant to this case: the income approach and the comparable sales approach. Under the income approach, the appraiser determines the value which the property's net earning power will support based upon a capitalization of net income. *See United States v. Eden Memorial Park Assoc.*, 350 F.2d 933, 935 (9th Cir. 1965). Under the comparable sales approach, the appraiser determines value based on recent sales of comparable properties in the market. *See id.* Both are accepted ways of estimating the value of property, but operate independently of each other. In this case, the Kuzmas' expert sought to testify based on the comparable sales approach.

An expert witness's appraisal of condemned property based on comparable sales is admissible, so long as the expert has a reasonable factual basis and states the assumptions on which the opinion is based. *See United States v. 0.161 Acres of Land, more or less, situated in City of Birmingham, Jefferson County, Ala.*,

837 F.2d 1036, 1040 (11th Cir. 1988). On the other hand, if an expert's testimony amounts to no more than a mere guess or speculation, the district court should exclude her testimony. *Id.*

Creasy first obtained a square-foot value for the Kuzmas' land by comparing it with recent sales of similar unimproved properties in the same vicinity. After identifying three recent sales of economy motels located nearby, Creasy subtracted the land value from the total purchase prices of these other motels. The difference represented the value of the Kuzmas' Motel.

While use of the income approach may have provided a "check and balance" for Creasy's appraisal, omission of the income approach from her report does not make the use of comparable sales approach any less acceptable. As noted above, the two approaches operate independently from one another – that is, both appraisal approaches are not required in tandem for an expert to meet *Daubert's* test for admissibility. Opposing counsel can inquire into the expert's factual basis, and the jury is

completely free to accept or reject an expert's testimony, and to evaluate the weight given such testimony in light of the reasons the expert supplies for her opinion. *Id.* At 1040-41. Because Creasy had a reasonable factual basis for her opinion, any perceived flaw in her testimony is a matter more appropriately tested in the crucible of the adversarial proceeding, and the district court erred by excluding it.

2

The Kuzmas also attempted to introduce the City's response to Interrogatory #26 through Clark Richards, who signed the interrogatories on behalf of the City[3]. The district court

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[3]The Interrogatory in its entirety states:
26. Please state whether or not you believe that the improvements on plaintiffs' property that you demolished on the date of the demolition had a value of an amount between $250,000.00 and $475,000.00 and provide the following:
A. The basis for your determination of the value of Plaintiffs' improvements on the date of the demolition; and
B. Whether you believe the plaintiffs' improvements had a greater or lesser value, and if so, provide the value of said improvements.

refused to admit this evidence because: 1) the interrogatory was not listed as an exhibit by the Kuzmas and its introduction would have been an unfair surprise to the City; 2) the answers to the interrogatories were compiled by a variety of persons who were unavailable to testify and therefore, Interrogatory #26 lacked foundation; 3) the answer to Interrogatory #26 was the value placed on the Motel by the Lee County Property Appraiser's Office, and thus was hearsay; and 4) the answer lacked sufficient reliability because it reflected the unsupported opinion of fair market value by the county appraiser.

Rule 33 of the Federal Rules of Civil Procedure provides that interrogatories "shall be answered separately and fully in

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ANSWER: No, it did not have a value between $250,000.00 and $475,000.00 on the date of demolition.
A. The Lee County Property Appraiser's building valuation for [the improvements].
B. Lesser value, the Lee County Property Appraiser's office values the building (improvements) at $72,240.00.

writing under oath" and "are to be signed by the person making them." FED.R.CIV.P. 33(b)(1),(2). The answers to interrogatories may be used at trial "to the extent permitted by the rules of evidence." FED.R.CIV.P. 33(c).

The Kuzmas sought to introduce the answer to Interrogatory #26 as an admission against a party opponent. Accordingly, the answer is admissible to the extent permitted by Rule 801 of the Federal Rules of Evidence. Under Rule 801(d)(2), an admission by a party-opponent is a statement offered against a party and, *inter alia*, the party's own statement or "a statement of which the party has manifested an adoption or belief in its truth," or "a statement by a person authorized by the party to make a statement concerning the subject." FED.R.EVID.801(d)(2)(A), (B), & (C).

We find that the district court erred in excluding Interrogatory 26. First, an admission by a party opponent is plainly not hearsay. *See* FED.R.EVID. 801(d). Moreover, while

it is true that a "witness may not testify as to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter," FED.R.EVID. 602, Mr. Richards' signature as the representative of the City attests to the City's adoption of the answer provided by the Lee County Appraiser's Office. Mr. Richards' signature, given under oath, provides sufficient foundation and indicia of reliability for the document's introduction.

Finally, the City cannot claim that the introduction of an interrogatory answer the City itself provided during the normal course of discovery constitutes "unfair surprise." The City was, or should have been, aware of its response to interrogatories served by the Kuzmas and the possible introduction of these responses as evidence. Although we recognize that Rule 403 of the Federal Rules of Evidence permits the district court to exclude otherwise relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice," we have also

recognized that Rule 403 is "an extraordinary remedy which the district court should invoke sparingly" and the balance "should be struck in favor of admissibility." *United States v. Dodds*, 347 F.3d 893, 897 (11th Cir. 2003) (citation omitted). For the foregoing reasons, we find that the district court erred in excluding "Interrogatory #26" and the City's answer[4].

B

Our inquiry does not end there. Under the well-settled rules of this Circuit, an error in the exclusion of evidence requires reversal only if the erroneous ruling resulted in a "substantial prejudicial effect." *Club Car, Inc. v. Club Car (Quebec) Import,*

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[4]After being frustrated in their attempts to introduce evidence of value through their expert and the City's answer to Interrogatory #26, the Kuzmas then sought to introduce evidence of value through the testimony of Timothy Kuzma. After a review of the record, we conclude that exclusion of Mr. Kuzma's testimony was proper under Rule 403 because Mr. Kuzma did not have an opinion as to the value of the Motel or the land during his deposition. Contrary to the City's answer to Interrogatory #26, Mr. Kuzma's testimony would have been an unfair surprise and unduly prejudicial to the City.

Inc., 362 F.3d 775, 780 (11th Cir. 2004) (citation omitted).

The district court granted the City's Rule 50(a) motion for judgment as a matter of law on the Kuzmas' inverse condemnation claim solely because the Kuzmas were unable to introduce evidence of value. Because the erroneous exclusion of the expert witness's testimony and the City's response to Interrogatory #26 formed the basis for the granting of the Rule 50(a) motion, the evidentiary ruling had a substantial prejudicial effect on the Kuzmas' case. Because we hold that the district court erred in excluding critical pieces of evidence relevant to the determination that judgment was appropriate as a matter of law, we also reverse the granting of judgment as a matter of law.

Conclusion

We find that the district court erred in dismissing the Kuzmas' loss of equity argument, excluding the Kuzmas' expert witness, excluding Interrogatory #26 and granting the City's Rule 50(a) motion on the inverse condemnation claim. We therefore

reverse and remand for further proceedings consistent with this opinion[5].

REVERSED and REMANDED

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[5]Consequently, the Kuzmas' appeal of the district court's refusal to grant them attorneys' fees is now moot.